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No. 96-110

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

STATE OF WASHINGTON and CHRISTINE O. GREGOIRE, ATTORNEY GENERAL OF THE STATE OF WASHINGTON,
Petitioners,
v.
HAROLD GLUCKSBERG, M.D., ABIGAIL HALPERIN, M.D., THOMAS A. PRESTON, M.D., and PETER SHALIT, M.D., PH.D.
Respondents.

On A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR JOHN DOE AS AMICUS CURIAE SUPPORTING RESPONDENT

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CONSENT OF PARTIES

All parties have consented to the filing of this Brief, and the letters stating that consent are attached.

INTEREST OF JOHN DOE

On September 20, 1996, John Doe obtained a judgment in the United States District Court for the Central District of California, Case No. 94-6089 CBM(Kx) declaring that

California Penal Code Section 401 is unconstitutional on its face because it violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. 939 F.Supp. 725. That Section, like RCW 9A.36.060, prohibits terminally ill individuals from obtaining assistance, even by licensed physicians, in ending their lives painlessly and with dignity.

The California Supreme Court interprets California Penal Code Section 401 to prohibit "participation in the events leading up to the commission of the final overt act, such as furnishing the means for bringing about death — the gun, the knife, the poison, or providing the water, for the use of the person who himself commits the act of self murder." *In Re Joseph G.*, 34 Cal.3d 429, 436, 194 Cal.Rptr. 163, 167 (1983). Under this interpretation, any physician who "aided, advised, or encouraged" John Doe in terminating his life would risk felony penalties in doing so; Penal Code Section 401 thus serves as an absolute prohibition on John Doe's exercise of this component of his right to liberty protected by the Fourteenth Amendment.

John Doe learned that he was HIV positive in 1984. Diagnosed with AIDS in January 1993, he is now in the advanced final stages of that disease and has been advised by his physician that his condition is terminal. With his immune system severely compromised (a CD4 count of 0), he now suffers from three debilitating diseases, each incurable.

The first to appear was Cytomegalovirus ("CMV") retinitis, a condition in which the virus attacks the optic nerve. Medication can slow the deterioration of his vision, but cannot prevent him from eventually going blind. For over a year he received that medication by injection directly into his eye, but now undergoes an experimental implant treatment. This virus causes death in a few weeks to months if it invades the brain or spinal cord.

In March, 1995, tests revealed that John Doe suffers from Mycobacterium Avium Complex ("MAC"), a bacterial infection. This causes chronic night sweats, fever, chills, malaise, nausea, and bone pain; it has been described as "the worst flu you ever had, every day of your life."

Also in March, 1995, a biopsy disclosed Kaposi's Sarcoma in the back of John Doe's throat. Patients with KS frequently die from invasion of this cancer into the lungs, causing progressive difficulty in breathing and ultimately death by suffocation.

Over the past year he has lost 35 lbs., 25% of his body weight. Neuropathy has confined him to bed 24 hours per day for the last 16 weeks. The CMV has spread to his other eye, and he suffers from pancreatitis and loss of kidney function. The fever, chills, etc. of MAC have persisted for the entire year. His *daily* medications, many of which cause significant unpleasant side-effects (e.g., nausea, diarrhea, kidney problems, feminization, impotence), now include Indinazir (an anti-viral for AIDS); Pyrazinamide (for MAC); Ethambutol (same); Biaxin (antibiotic); Dapsone (for MAC); Diflucan; Lamivudine (antiviral for AIDS); Vasotec (anti-hypertensive); AZT (for AIDS); Megestrol (appetite stimulant); Neupogen; Epogen (for white cell count); steroid shots; Percocet (pain relief); Vicodin; Foscarnet infusions (for CMV); nausea medication; and a morphine patch which he wears 24 hours a day.

AIDS patients typically die in a slow, prolonged, and extremely painful process. By the time that health care professionals agree that there is no hope for any meaningful quality of life and deem patients "end stage", patients are often emaciated beyond belief, reminiscent of starving individuals in Ethiopia or the dead photographed concentration camp victims from World War II. During this stage, patients usually lose control of all bodily functions, especially urination and defecation, and are rendered helpless, often

bed-bound, lying in their own excrement. Because of the multitude of opportunistic infections and AIDS-associated tumors, all end-stage AIDS patients can suffer from intractable pain.

John Doe has seen many of his peers end their lives in pain and degradation from the ravages of AIDS. Rather than suffer that fate, John Doe wants the ability to control his own final days. Whether the State of California can deny him that right, forcing him to prolong his suffering or restricting him to inherently more dangerous, painful, risky and often barbaric methods of suicide, will be controlled by this Court's ruling in these consolidated cases.

The opinion of the Ninth Circuit vindicates the rights of the terminally ill, such as John Doe, far more forcefully and eloquently than John Doe could in any Brief. John Doe is also confident that the briefing which this Court will receive on the merits from the parties and from other amici will be as thorough and instructive as is humanly possible. Notwithstanding his intense interest in the merits of this issue, John Doe will limit this Brief to a preliminary legal issue, namely the effect of challenging the constitutionality of a statute on its face. This issue was briefed in detail by both John Doe and the California Attorney General in Doe's action, and Doe believes that the authorities developed there would be helpful to this Court.

STATEMENT

John Doe adopts the statement of Respondents.

SUMMARY OF ARGUMENT

In footnotes 8 and 9 of the opinion below (79 F.3d at 797 n. 8, 798 n. 9), the Ninth Circuit addressed the nature of the challenge made to RCW 9A.36.060: whether that statute was void "on its face" or only "as applied". This issue arises

in numerous cases raising Constitutional issues and recent case authority has created a conflict in the Circuits.

Amicus John Doe submits that determining the type of challenge proper requires answers to four questions:

(1) Who has standing to challenge the Constitutionality of a statute?

(2) How much protected conduct must a statute reach before a court may declare it void "on its face"?

(3) What burden of proof must a plaintiff meet in order to obtain a declaration voiding a statute?

(4) What happens to a statute declared void?

While no one decision of this Court articulates the answers to all four questions, this Court's consistent practice over many years defines the guidelines for facial challenges. In general, these are that the plaintiff must be someone to whom the statute could not constitutionally apply; that the statute must reach a "substantial amount" of protected conduct; that the statute must create an undue burden on the exercise of a Constitutional right; and that if the offending portion of the statute cannot be severed, the entire statute should be declared void.

ARGUMENT

I.

BACKGROUND OF THE ISSUE

Any discussion of facial challenges to the constitutionality of a statute must begin with this Court's decision in *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095 (1987). In the course of its opinion, this Court stated that "A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must

establish that no set of circumstances exists under which the act would be valid." 481 U.S. at 745, 107 S.Ct. at 2100.

Three Circuits have expressed uncertainty regarding the implications of this statement.[1] The Third, Eighth, and Ninth Circuits concluded that this Court did not follow this principle in *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791 (1992) ("*Casey*"), and that facial challenges may be brought under a wider range of circumstances. The Fifth Circuit, in contrast, understood *Salerno* to control facial challenges. *Barnes v. Moore*, 970 F.2d 12, 14 n. 2 (5th Cir. 1992). Several members of this Court have commented on this issue in *Janklow v. Planned Parenthood, Sioux Falls Clinic*, ___ U.S. ___, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996); *Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013, 1014, 113 S.Ct. 1668, 1669, 123 L.Ed.2d 285 (1993); and *Ada v. Guam Society of Obstetricians and Gynecologists*, 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992).

Knowing when and how facial challenges may be brought is of considerable importance. Constitutional challenges to statutes are frequent, and both courts and parties deserve a clearly defined framework for the types of challenges which may be made.

This very case exemplifies some of the uncertainties which may arise:

> "Notwithstanding the District Court's declaration that the Washington statute is unconstitutional, the effect of its ruling is unclear. It is extremely unlikely that the

[1] *Compassion in Dying v. Washington*, 79 F.3d 790, 798 n. 9 (9th Cir. 1996); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-8 (8th Cir. 1995); *Fargo Women's Health Organization v. Schafer*, 18 F.3d 526 (8th Cir. 1994); *Casey v. Planned Parenthood*, 14 F.3d 848, 863 n. 21 (3rd Cir. 1994).

district judge intended to strike down the entire statute, as the state asserts she did, in view of the fact that the appellants attacked only its 'or aids' provision. This is particularly true because the 'or aids' provision is clearly severable under Washington law. [Citation omitted.]

It is equally unclear whether the District Judge intended to strike the 'or aids' provision on its face or as applied. [Citation omitted.] Again, we think it unlikely that she intended to strike the entire provision for two reasons. First, the plaintiffs only argued that the assisted-suicide provision violated the constitutional rights of terminally ill, competent adults, and only offered evidence to that end. The parties did not address whether broader relief was permitted or required, and the District Court offered no explanation as to why a finding that the provision was unconstitutional as applied to the terminally ill would cause her to strike the provision on its face rather than as applied to the injured group.

* * *

Declaring a statute unconstitutional as applied to members of a group is atypical but not uncommon. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985) (holding that state law permitting police officers to use deadly force to prevent the escape of felony suspects was unconstitutional as applied to suspects who pose no immediate threat to officers or others); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (holding Wisconsin's mandatory attendance law unconstitutional but only as applied to Amish children who have graduated from eight grade). Although the Court did not explicitly use the term 'as applied', it did explicitly affirm the judgment of the Wisconsin Supreme Court, *id.* at 207, 92 S.Ct. at 1529, which struck down the statute only as applied to Amish

children who had graduated from the eighth grade. *Wisconsin v. Yoder*, 49 Wis.2d 430, 182 N.W.2d 539 (1971).

Because we are not deciding the facial validity of RCW 9A.36.060, there can be no question that the exacting test for adjudicating claims of facial invalidity announced in *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), is inapplicable here. ('A facial challenge to a legislative Act is, of course, the most difficult challenged to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act wold be valid.' *Id.* at 745, 107 S.Ct. at 2100). For that reason alone, we would reject Washington's suggestion that we use the *Salerno* test for adjudicating plaintiffs' constitutional challenge." *Compassion in Dying*, 79 F.3d at 797 n. 8 and 798 n. 9.

These passages from the opinion below, combined with a review of earlier decisions by this Court, aid in identifying the critical issues:

(a) What rules of standing apply to facial challenges, *i.e.*, may such a challenge may be brought by persons to whom the statute *could* apply, or only by those to whom it could not?

(b) How extensive must the potential unconstitutional applications be in order to justify a facial challenge rather than one "as applied"?

(c) What form should the relief take?

(d) What showing must be made in order to declare a statute unconstitutional?

While this Court has never articulated answers to these four questions in any one decision, express language in some opinions and the natural consequence of its holdings in numerous related cases provide those answers. John Doe

submits that those answers demonstrate this Court's consistent *rejection* of the dictum in *Salerno*.

II.

THE AUTHORITY CITED BY *SALERNO* ESTABLISHES ONLY A REQUIREMENT OF STANDING, NOT A TEST FOR ADJUDICATING FACIAL CHALLENGES

Salerno cited as authority the decision in *Schall v. Martin*, 467 U.S. 253, 269 n. 18, 104 S.Ct. 2403, 2412 n. 18 (1984). *Schall* contains no substantive discussion, but, in turn, cited *United States v. Raines*, 362 U.S. 17, 21-23, 80 S.Ct. 519, 522-3 (1960), which is thus the ultimate source authority for *Salerno*.

Raines was a criminal prosecution for interference with the right to vote. The defendants challenged the statute as beyond the power of Congress under the Fifteenth Amendment. The District Court dismissed the complaint in reliance on this Court's decision in *U.S. v. Reese*, 92 U.S. 214 (1876).

The statute in *Reese* had punished *all* interference with the right to vote, even that not resulting from racial discrimination. This Court held in *Reese* that Congressional power to enforce voting rights under the Fifteenth Amendment was limited to punishing discrimination on account of race. Because the statute exceeded Congress' power, it was unconstitutional and should not be applied even to those whom Congress could have punished under a narrower statute. 92 U.S. at 220-1.

Raines declined to follow *Reese*, holding that where the application of the statute was clearly constitutional in the particular case, the defendant could not complain that the statute might be applied unconstitutionally to others. 362 U.S. at 24-25, 80 S.Ct. at 524-5. This was a determination

of standing, not a rule affecting the merits of facial challenges.

Raines' concern with standing appears clearly from its reliance on and citation to *Barrows v. Jackson,* 346 U.S. 249, 73 S.Ct. 1031 (1953), a classic standing case. 362 U.S. at 21-2, 80 S.Ct. at 523. Also telling is the fact that *Raines* did not overrule *Reese* or even disapprove it. *Raines* declined to follow *Reese* not because *Reese* improperly applied the rules controlling facial challenges, but because this Court had developed rules of standing which made *Reese* inapplicable.[2]

Raines supports *Salerno* only to the extent that a uniform invalidity of the statute may be necessary to confer standing — application of a statute void in all applications perforce confers standing on the person to whom it is applied. But in *Raines* the statute manifestly was constitutional as to the particular defendants; *Raines* does not even address facial challenges in the opposite context, i.e., when, as here, a party alleges that he or she is within the class whose constitutional rights are violated. Such persons undoubtedly have standing to sue; whether *Salerno* states the proper test for the challenges they bring can only be derived, if at all, from other cases.

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[2]More liberal principles of standing can apply in some circumstances. E.g., *Edmonson v. Leesville Concrete Co., Inc.,* 500 U.S. 614, 628-9, 111 S.Ct. 2077, 2087 (1991); *Singleton v. Wulff,* 428 U.S. 106, 96 S.Ct. 2868 (1976); *Eisenstadt v. Baird,* 405 U.S. 438, 444-6, 92 S.Ct. 1029, 1033-5 (1972); *Barrows v. Jackson, supra; NAACP v. Alabama,* 357 U.S. 449, 459-60, 78 S.Ct. 1163, 1170 (1958). And see *Alexander v. U.S.,* 509 U.S. 544, 555, 113 S.Ct. 2766, 2774 (1993) (noting that the First Amendment overbreadth doctrine is an exception to the rule that those to whom a statute may apply lack standing to sue).

III.

THIS COURT'S CONSISTENT PRACTICE CONTRADICTS *SALERNO;* STATUTES WHICH REACH A SUBSTANTIAL AMOUNT OF PROTECTED CONDUCT MAY BE VOIDED IN THEIR ENTIRETY IF SEVERANCE OF THE OFFENDING PORTION IS NOT POSSIBLE

If *Raines* solves the standing issue, answers to the remaining questions — the extent of the unconstitutional impact, the showing necessary, and the relief which is appropriate — can be found by reviewing this Court's practice in deciding Constitutional issues. The most direct route to *Salerno* follows the path of the remedy appropriate in facial challenges.

When presented with a facial challenge to a statute brought by a party with standing to sue, this Court has several options available:

(a) It could declare the statute void.

(b) It could hold the statute void in the class of cases represented by the plaintiffs.

(c) It could treat the case as an "as applied" challenge and limit its ruling to the facts presented by the particular plaintiff(s).

In *Kolender v. Lawson,* 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), this Court specifically affirmed its power to declare statutes void *in their entirety* even if they could constitutionally be applied to some:

> "In his dissent, Justice WHITE claims that '[t]he upshot of our cases . . . is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications.' *Post,* at 1865. The description of our holdings is inaccurate in

several respects. First, it neglects the fact that we permit a facial challenge if a law reaches 'a substantial amount of constitutionally protected conduct.' Second, where a statute imposes criminal penalties, the standard of certainty is higher. This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. The dissent concedes that 'the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment . . . .' *Post,* at 1866. However, in the dissent's view, one may not 'confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own.' *Post,* at 1865. But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines." 461 U.S. at 358 n. 8, 103 S.Ct. at 1859 n. 8, citations omitted.[3]

Kolender directly contradicts *Salerno.* Under *Kolender,* statutes which reach a substantial amount of protected conduct — a class certainly including RCW 9A.36.060 — may be declared void *in their entirety.* While this result must be considered in its proper context (see below), it is consistent with this Court's actions in numerous similar cases which, taken together, disclose the following circumstances under which statutes may be voided:

(1) Courts may strike down a statute as void for vagueness if persons of common intelligence must guess at its meaning, such that it fails to provide adequate notice of what conduct is forbidden or required. *Kolender*

[3]To anticipate one possible rejoinder to this language, *Salerno, supra,* 481 U.S. at 745, 107 S.Ct. at 2100, Doe notes that *Kolender* was not exclusively a First Amendment case, but also relied on the constitutional right to freedom of movement. 461 U.S. at 358, 103 S.Ct. at 1859. The examples cited below confirm that, in any event, this Court has never limited overbreadth challenges to First Amendment cases.

v. Lawson, supra; Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618 (1939).

(2) Courts may strike down statutes as "overbroad" when they have an inhibitory effect on free speech. *Broadrick v. Oklahoma,* 413 U.S. 601, 611-13, 93 S.Ct. 2908, 2915-16 (1973). Similarly, courts may strike down statutes as facially invalid if they violate the Establishment Clause. *Bowen v. Kendrick,* 487 U.S. 589, 600-602, 108 S.Ct. 2562, 2569-71, 101 L.Ed.2d 520 (1988); *Edwards v. Aguillard,* 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987).

(3) Courts may strike down statutes which sweep unnecessarily broadly and thereby invade the area of protected freedom. *Griswold v. Connecticut,* 381 U.S. 479, 485, 85 S.Ct. 1678, 1682 (1965); *Roe v. Wade,* 410 U.S. 113, 164, 93 S.Ct. 705, 732, 35 L.Ed.2d 147 (1973); *Aptheker v. Secretary of State,* 378 U.S. 500, 844 S.Ct. 1659 (1964).

(4) Courts may strike down statutes which have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus — the undue burden test of *Casey, supra.* And see *Zablocki v. Redhail,* 434 U.S. 374, 387, 98 S.Ct. 673, 681 (1978) (similar standard applied to protect marital relationship).

(5) Courts may strike down ordinances as regulatory takings if the ordinance does not substantially advance a legitimate state interest no matter how it is applied. *Yee v. City of Escondido,* 503 U.S. 519, 533-4, 112 S.Ct. 1522, 1531-2, 118 L.Ed.2d 153 (1992).

(6) Courts may strike down statutes as underinclusive on equal protection grounds even if those statutes would properly apply to some persons. *Orr v. Orr,* 440 U.S. 268, 271-2, 99 S.Ct. 1102, 1107-8, 59 L.Ed.2d 306 (1979).

And see *Kraft General Foods v. Iowa Dept. of Revenue*, 501 U.S. 71, 81-2, 112 S.Ct. 2365, 2371-2 (1992) (applying similar reasoning in finding violation of Foreign Commerce Clause); *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (same under the Negative Commerce Clause); *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) (same when discriminatory treatment affects First Amendment rights).

(7) Courts may strike down statutes where the valid provision is inextricably intertwined with the invalid one(s). See *Dorchy v. Kansas*, 264 U.S. 286, 290, 44 S.Ct. 323, 325 (1924); *Raines, supra*.

(8) Courts may strike down criminal statutes where the statute would require such a revision that it no longer gave intelligible warning of the conduct prohibited. *Raines, supra*, 362 U.S. at 22-3, 80 S.Ct. at 523.

(9) Courts may strike down statutes which are unconstitutional in the vast majority of their intended applications, and it can fairly be said that the statute was not intended to stand in only the remaining fraction of cases. See *Butts v. Merchants & Miners Transportation Company*, 230 U.S. 126, 33 S.Ct. 964 (1913); *Raines, supra*.

(10) Courts may strike down an unconstitutional part of a statute which is wholly independent of the constitutional part. *Allen v. Louisiana*, 103 U.S. 80, 83-4, 26 L.Ed 318 (1881); *Field v. Clark*, 143 U.S. 649, 695-6, 12 S.Ct. 495, 505-6, 36 L.Ed. 294 (1892); *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976).

Taken as a whole, these cases demonstrate that this Court has followed a consistent practice of striking down in their entirety statutes which reach a substantial amount of protected conduct, when the statutes are challenged by persons

to whom they cannot constitutionally apply, *even if those statutes might constitutionally apply to others*. A review of the alternatives will demonstrate why this Court has acted so consistently in the examples cited above.

A. Challenges By Individual Plaintiffs Are Impractical.

The case before this Court is not one in which any ruling could be limited to the particular plaintiffs only. The very nature of the challenge identifies a large common class of similarly situated persons whose circumstances will differ only in detail from those of the plaintiffs here. Individuals who are terminally ill and suffering have no effective opportunity to protect their constitutional rights on a case by case basis because their medical condition precludes any active involvement in litigation. It would be exceedingly burdensome for each terminally ill patient to be forced to sue in order to exercise the fundamental right at issue here.

B. No Limiting Construction Is Available.

Taking the statute generally, one reason for voiding the entire statute is the lack of any basis for a limiting construction. RCW 9A.36.060 is a single section, accomplishing all of its results by the same general words. Like the ordinance at issue in *City of Houston, Texas v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), Washington's law "is not susceptible to a limiting construction because . . . its language is plain and its meaning unambiguous. Its constitutionality cannot 'turn upon a choice between one of several alternative meanings.' [Citations omitted.] Nor can the ordinance be limited by severing discrete unconstitutional subsections from the rest." *Id.* at 468, 107 S.Ct. at 2513.[4]

[4]Although the issue of severability is for this Court to decide, *Wyoming v. Oklahoma*, 502 U.S. 437, 459, 112 S.Ct. 789, 803 (1992); *Dorchy v. Kansas, supra*, 264 U.S. at 291, 44 S.Ct. at 325, it is worth noting that Washington law treats the entire statute as inoperative when

C. Declaring A Judicially Created "Exceptions Clause" To The Statute Conflicts With Recognized Principles Of Severance And Intrudes On The Power Of The Legislature.

In *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985), this Court applied the concept of "severance" in a somewhat unusual way by grafting an exceptions clause onto the statute. In so doing, it exempted an entire class from the operation of the statute.

While this approach would grant respondents satisfactory relief, and was the path taken by the Ninth Circuit (79 F.3d at 798 n. 9), Doe submits that better practice would be to declare the entire statute void as was done in, *e.g., Kolender, supra; Lanzetta, supra; Aptheker, supra; Casey, supra; Zablocki, supra; Griswold, supra; Orr, supra; Kraft General Foods, supra;* and *Oregon Waste Systems, Inc., supra.* This would accomplish two important results.

First, it would eliminate the possibility of any future inhibition on the exercise of constitutional rights which might exist because of the sweeping language of the statute. This Court expressed precisely this concern in the First Amendment overbreadth cases and in non-First Amendment cases such as *Kolender*, *Lanzetta*, and *Griswold*; the concern is clear but implied in *Casey* and *Zablocki*.

Of perhaps equal importance is that this Court has frequently recognized that unitary provisions cannot be severed. See, e.g., *Wyoming v. Oklahoma, supra*, 502 U.S. at 460, 112 S.Ct. at 803 (rejecting severability because "there are no parts or separate provisions in the invalid [section] of the Act .... Nothing remains to be saved once that provision is stricken. Accordingly, the Act must stand

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the unconstitutional portion is inseparable from the rest. *In Re Hendrickson*, 12 Wash.2d 600, 123 P.2d 322, 326 (Wash. 1942).

or fall as a whole."); *U.S. v. Ju Toy*, 198 U.S. 253, 262 (1905) ("[T]he relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains."); *Illinois Cent. R.R. v. McKendree*, 203 U.S. 514, 529-30, 27 S.Ct. 153, 158-9 (1906).

The reason for this is clear: voiding the entire statute gives proper deference to the responsibility of the legislative branch. *Reese, supra*, recognized this principle, and its teaching on the effect of facial challenges, in contrast to its views on standing, should still be considered sound:

> "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, . . . which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.
>
> *It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and*

leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." 92 U.S. at 221, emphasis added.

See also *Kolender*, *supra*, 461 U.S. at 358 n. 7, 103 S.Ct. at 1858 n. 7 (quoting the emphasized language favorably).

This Court's role in the government makes it preferable to void the statute and allow the Legislature to redraft it. Instead of an absolute prohibition, there would have to be a legislative definition of who was ineligible to exercise the right, the safeguards which might protect against its abuse, and approved principles or methods of carrying out the right. The Legislature deserves the opportunity to make these decisions in the first instance.

If, on the other hand, the statute remains in effect subject to piecemeal attack, the law is uncertain and the Legislature loses control over the process of designing a statute in accordance with democratic preferences. It also discourages the legislative branches from exercising their responsibility to evaluate the constitutionality of a statute before passage. This Court's respect for the process of legislation should dictate a policy of voiding unitary statutes which punish

protected conduct, letting the Legislature design a new statute in light of constitutional mandates.

IV.

CASEY'S "UNDUE BURDEN" TEST SETS THE CORRECT STANDARD OF PROOF

RCW 9A.36.060 clearly imposes an undue burden on the exercise of a fundamental privacy right. The same standard applied in *Casey* — which is the same standard this Court has applied in many cases — should apply here. Not only is the analogy with *Casey* compelling, but the importance of privacy as a component part of liberty, and the personal nature of privacy rights, requires that government actions not inhibit their exercise. In *Zablocki*, *supra*, this Court recognized that States could impose reasonable regulations which did not "significantly interfere" with the marital relationship. 434 U.S. at 386, 98 S.Ct. at 681. In applying this "undue burden" test without using that language, this Court stated:

> "Under the challenged statute, no Wisconsin resident in the affected class may marry in Wisconsin or elsewhere without a court order, and marriages contracted in violation of the statute are both void and punishable as criminal offenses. Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges. These persons are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such

freedom to be fundamental." 434 U.S. at 387, 98 S.Ct. at 681, footnote omitted.

V.

CONCLUSION

This case, like John Doe's own case, does not require a search of the language or history of the Constitution for the phrase "physician aid in dying". Rather, it requires this Court to undertake its traditional role of breathing life and meaning into the term "liberty" as used in the Constitution. The process of construction by which this Court performs its judicial role can and should implement the intent of the American people to protect from government interference the right to make decisions central to human dignity and self-worth.

Statutes prohibiting physician aid in dying intrude drastically into the space of private decision-making protected by the guarantee of liberty. The effort to impose an absolute prohibition requires a remedy appropriate to the scope of the statute, and this Court should not hesitate to declare RCW 9A.36.060 invalid on its face.

DATED: December 09, 1996

Respectfully submitted,

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APPENDIX

[ATTORNEY GENERAL OF WASHINGTON SEAL]

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November 25, 1996

Mr. Mark E. Field
Lawrence Silver & Associates
111 West Ocean Boulevard Suite 1900
Long Beach, California 90802-4649

Re: *Washington v. Glucksberg*,
U.S. Supreme Court Cause No. 96-110

Dear Mr. Field:

This responds to your request for consent to file a brief as *amicus curiae* in the above-referenced matter on behalf of John Doe. Your request for consent is granted.

Very truly yours,

/s/ WILLIAM L. WILLIAMS
William L. Williams
Sr. Assistant Attorney General

WLW:am

cc: Kathryn L. Tucker

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November 20, 1996

Mark E. Field
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Long Beach, CA 90802-4649

Re: *Washington v. Glucksberg; Vacco v. Quill*

Dear Mr. Field:

This responds to your request to file a brief as amicus curiae in the above-referenced matters on behalf of John Doe. We understand that you intend to support the position of the Respondents. Your request for consent is granted. Consistent with our position throughout this litigation, we do not plan to share argument time with amici.

Please find enclosed a copy of the Court's order setting forth the briefing schedule for your information.

Also, please note that the joint appendix in *Washington v. Glucksberg* will be posted on the Attorney General's Office home page (http://www.wa.gov/ago) in a PDF format when it has been completed. To download it, you will need a program entitled Acrobat Reader, which can be downloaded free of charge from the Adobe home page (hhtp://www.adobe.com). In the meantime, the Complaint and significant briefing in support of Respondents in *Washington v. Glucksberg* is currently available on the Perkins Coie home page (hhtp://www.perkinscoie.com). We hope this medium will allow interested parties expeditious access to these materials and at the same time avoid unnecessary printing and mailing costs.

Thank you for your support of Respondents' position. We look forward to receiving a copy of your brief.

Very truly yours,

/s/ KATHRYN L. TUCKER
Kathryn L. Tucker

KLT:rak
Enclosure

cc: William L. Williams
Lucia M. Valente
Marc F. Scholl